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Review: Cramton, Currie and Kay, Cases on Conflict of Laws

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BOOK REVIEWS

CRAMTON, CURRIE AND KAY, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS*, 2nd ed., 1975

West Publishing Company, 1000 pp.

The long-awaited second edition of Cramton and Currie's *Conflict of Laws: Cases—Comments—Questions*, has finally appeared, with the addition of a new co-author, Professor Herma Hill Kay. When the first edition appeared in 1968, it was enthusiastically received by conflicts teachers such as myself, whose orientation was toward policy-centered solutions, in particular those based on the theory of interest analysis developed by the late Brainerd Currie. Perhaps even more significant was the authors' development of the topic of choice-of-law, which they approached by means of a comprehensive analysis of the different theories of the nature of the conflict of laws and the different methodologies that had been proposed for the resolution of choice-of-law problems. Those of us who believed that this was the best way of approaching choice-of-law—and the subject of conflict of laws in general—had at last found a casebook that was premised on this approach.

But I for one, perhaps because I had become so accustomed to establishing my own structure of the course, picking and choosing from the casebook with reference to that structure, and extensively supplementing the casebook with other cases and material, did not fully appreciate the potential for "revolutionary conflicts pedagogy" that was contained in this masterful work. This was not due to any failing on the part of the authors. As they stated in the preface,¹ which is repeated verbatim in the preface to the second edition:² "The first two chapters are the heart of the book, presenting a comparison of the principal competing theories underlying American choice of law. The traditional subdivision of the subject into tort, contract, and other pigeonholes is avoided as irrelevant and misleading, except to illustrate the operation of the First Restatement." And, as they went on to say,³ again repeated verbatim in the preface to the second edition:⁴ "The format of this book is that championed by Hart and Wechsler: Illustrative principal cases combined with extensive notes containing additional cases, statutes, academic commentary, and plenty of rhetorical questions. The sampling of law-review articles and books is especially liberal because academic circles have provided an unusually large proportion of the significant thinking about conflict of laws." The authors made very clear what it was that they were trying to accomplish and how the casebook could be used effectively to teach choice-of-law—and the subject in general—with reference to the different methodologies and theories that have been developed for the solution of conflicts problems.

At the same time the authors related the "principal competing theories underlying American choice of law" to the other basic components of the subject, jurisdiction of courts and recognition of foreign judgments. As they stated: "To study juris-

¹ Preface to Cramton and Currie, *Conflict of Laws: Cases-Comments-Questions* (hereinafter cited as Preface to First Edition) XI (1968).

² Preface to Cramton, Currie and Kay, *Conflict of Laws: Cases-Comments-Questions* (hereinafter cited as Preface to Second Edition) XIII (2d ed. 1975).

³ Preface to First Edition XII.

⁴ Preface to Second Edition XV.

⁵ On the well-founded assumption that jurisdiction of courts is always covered in the first-year procedure course.

diction in a conflicts course before considering choice of law would be simply repetitive;⁵ our notion is that a review of the subject in light of a choice of law background adds useful new insights to familiar problems. Similarly, the chapter on judgments considers the impact of res judicata policy upon the principles underlying jurisdiction and choice of law."⁶ And in the chapter on divorce there would be "an excellent opportunity for reexamining and correlating the three kin concepts of jurisdiction, choice of law and respect for judgments."⁷ Finally, throughout the book, there is the overriding aspect of federalism, the recognition that American conflicts law must be approached from the perspective of interstate and federal-state relations and that the problems of choice-of-law, jurisdiction of courts and recognition of judgments must be seen as "issues of the distribution of powers in the American federal system."⁸ In this vein, the book concluded with a chapter on conflicts between federal and state law.

As indicated by much of the verbatim language in the preface to the second edition, the second edition follows the same structure and has the same objectives as the first. In fact, the second edition is unchanged in many places, and what has occurred is primarily an *updating*, particularly of the central chapter 2, to take account of the "numerous decisions and articles during the last seven years further refining and reacting to modern theories of choice of law."⁹ While, as the authors say, that chapter has been "substantially revised,"¹⁰—which may have some significant pedagogical effect for reasons that I will develop subsequently—the revision builds on the essential structure that was established in the first edition. There has also been some

⁵ See p. 592.

⁶ Preface to First Edition XIII; Preface to Second Edition XIV.

⁷ Preface to First Edition XII; Preface to Second Edition XIV. The chapter is headed "Divorce—A Special Problem of Choice of Law, Jurisdiction and Recognition of Judgments." Somehow the separate chapter on decedents estates seems out-of-place. Although it may illustrate "a peculiar affectation of the courts that has lingered too long from a bygone day," Preface to First Edition XII, Preface to Second Edition XIV, the matter does not seem sufficiently important to warrant separate treatment, and, in my view, would have been more appropriately included in the chapter on jurisdiction of courts. But casebook authors do have a right to their "favorites," see D. Currie, *The Multiple Personality of the Dead: Executors, Administrators and the Conflict of Laws*, 33 *U.Chi.L.Rev.* 429 (1966), and this is the only reason that I can see for a separate chapter on the subject in the casebook.

⁸ Preface to the First Edition XI; Preface to the Second Edition XIII. As a distinguished comparativist has observed, "[t]he present American debate seems to give support to my view that general theories on private international law may sometimes be as much induced, or at least influenced, by the peculiarities of a national legal order as the specific conflicts rules that belong to it." R. DeNova, *Historical and Comparative Introduction to Conflict of Laws* 595 (1966). To me it is clear beyond peradventure that American conflicts law has developed in response to the needs of a federal system and that, at least insofar as choice-of-law is concerned, international cases (I do not consider conflicts between American states and Canadian provinces to be "international" cases, given the unpatrolled border, linked economies and essentially common legal systems of the two countries) have had to be "accommodated" within the structure established for the solution of interstate cases. See Hay, *International Versus Interstate Conflicts Law in the United States*, 35 *Rabels Zeitschrift* 429, 490 (1971). As to the matter of the necessity for a separate approach to international cases, compare Ehrenzweig, *Interstate and International Conflicts Law—A Plea for Segregation*, 41 *Minn. L. Rev.* 717 (1957), with Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 *Calif. L. Rev.* 54 (1966).

⁹ Preface to Second Edition XIV-XV.

¹⁰ *Ibid.*

revision of the chapter on jurisdiction of courts, where indeed some significant developments have occurred during the last seven years. But in the areas where little or no change has occurred—recognition of judgments, the Constitution and choice of law, divorce, decedents' estates, and surprising as it may seem, conflicts between federal and state law, there has been practically no revision of the casebook.¹¹ In the true sense of the term, the second edition is just that, an updating of the book to take account of new developments while keeping the basic structure—and objectives—of the original work intact.

I come back then to the potential for "revolutionary conflicts pedagogy" that the book contains, a potential that I—and I believe many others—may have missed, or at least, failed to fully appreciate, on the "first go-round." The "revolutionary conflicts pedagogy" to which I refer relates both to the matter of *how* choice-of-law should be taught, and, in view of the "choice-of-law background" with which the other components of the subject are approached, the matter of *why* it is necessary to devote more time to those other areas that I believe that many of us have been doing. It also relates to the justification for a comprehensive course in the conflict of laws¹² in these days of concern for a "relevant" curriculum.

In 1973, when I was the chairperson of the A.A.L.S. section on the conflict of laws, I conducted a survey among conflicts teachers in preparation for that year's roundtable, which was built around the classroom teaching of conflicts. That survey revealed that in recent years a great many of us have developed the course principally—in my own case, almost entirely—around the choice-of-law process and have substantially de-emphasized that teaching of recognition of judgments except in regard to divorce and post-divorce proceedings. Jurisdiction of courts, again except in regard to divorce and post-divorce proceedings—where it is inextricably bound with choice-of-law appeared to be rarely covered at all.¹³ For many of us then—and as a result, for our students—the course in conflicts has become a course in choice-of-law.

Why has this been so? The most obvious answer is that this is "where it's at," at least insofar as we academics are concerned. This is the area where every case is a "major" one, where theories, approaches and "variations on themes"¹⁴ abound, where everything is "in ferment." And it cannot be denied that this area is extremely interesting, not only for us, but also, I think, for our students. Recognition of judgments, on the other hand, involves "black letter law," under the dictates of the Full Faith and Credit clause,¹⁵ and the students can "pick it up on their own." Besides, the students do get some exposure to this area in our "obligatory"—because this is the kind of conflicts case that the average lawyer is most likely to encounter in practice—coverage of interstate divorce and post-divorce proceedings. And, since we are so pressed for time, we cannot indulge in the "luxury" of reviewing jurisdiction in the light of the "choice-of-law background." But, whatever the reason, the em-

¹¹ In the chapter on divorce, the authors have added a section dealing with post-divorce proceedings and the "interstate child," which is a most important area in a mobile society such as ours. There has also been some updating in the chapter on conflicts between federal and state law, but no structural changes.

¹² In this connection I am referring to the course of three semester hours or four quarter-hours, which is how it is now offered at practically all American law schools.

¹³ Some teachers were also including material on conflicts between federal and state law, particularly the "Erie problem."

¹⁴ See the discussion of "variations on themes" in Sedler, *The Last Treatise, Review of Weintraub: Commentary on the Conflict of Laws*, 50 *Tex. L. Rev.* 1064, 1065 (1972).

¹⁵ Very few cases, of course, involve recognition of foreign country judgments.

phasis clearly has been on choice-of-law, and at least for many of us, the other components of the subject have been substantially de-emphasized or even ignored.

What the authors of this casebook have succeeded in doing, in my view, is to make choice-of-law "pedagogically manageable"—by focusing on the "principle competing theories underlying American choice of law"—and precisely because they have related those theories to the other components of the subject in the context of the "distribution of powers in the American federal system," they have demonstrated not only the necessity of our exploring with our students the interrelationship between choice-of-law, jurisdiction of courts and recognition of judgments, but also of properly covering the theoretical underpinnings of the latter two areas, and of tying all three areas together within the framework of "our Federalism." Let me try to develop this point as clearly as I can.

By focusing on the "principal competing theories underlying American choice of law," the authors have demonstrated that choice-of-law methodology—of whatever variety—is fully transferable to "tort, contract and other pigeonholes." When the students have achieved an understanding of the different approaches to choice-of-law, they have hopefully mastered choice-of-law methodology, or to put it less grandly, they now have come to realize what choice-of-law is all about. *They do not need repetitive practice in solving choice-of-law problems.* But this is precisely what we are doing—and I have been the most flagrant offender in this regard—when, after fully covering the different approaches and methodologies, we also explore in depth choice-of-law in torts, contracts, property, etc. The choice-of-law process needs only one "go-around," and that "go-around" is amply provided in chapters 1 and 2 of the casebook. Following the structure of these chapters—with such additions and/or omissions as particular instructors may think necessary to improve on it.—¹⁶ we can properly and effectively teach choice-of-law in considerably less time than many of us have been doing. And, if repetition is diffusive—as well as often boring—perhaps the impact of our teaching of this area may be even greater than when it has comprised substantially the whole of the course.

I am also persuaded that it has been a mistake to shortchange recognition of judgments, as many of us have been doing. While this area does largely involve "black-letter law," the thoughtful and precise development of the topic in chapter 5 of the casebook demonstrates most clearly, in my view, that it is very necessary for American lawyers to understand exactly why this "black-letter law" has developed in the manner that it has. Our concern for what may be called "contemporary relevance" and "live problems" can obscure the fact that in a course such as conflicts it is also necessary to teach the theory behind the "well-settled principles" that the courts apply in certain areas. In the area of recognition of judgments, as I believe nowhere else, the students can see the development of the rationale of the Full Faith and Credit clause, and how, in this area, that rationale has been used to weld together the separate "sovereignties" that make up the component parts of our federal system.¹⁷ Similarly, devoting less time to choice-of-law may free some time for a new look at jurisdiction "in light of a choice of law background," and again from the perspective of the "distribution of powers" between the courts of a federal system such as ours.

In other words, the casebook has been structured and developed in such a way as to provide for both depth *and* breadth of coverage—and to eliminate much of the

¹⁶ I find that the additions that I am planning to make can easily be accommodated within that structure.

¹⁷ Conversely, another aspect of "our Federalism," the recognition of differences between the states and of the necessity of allowing room for experimentation, is reflected in the book's treatment of another "settled matter," that of constitutional limitations - or more accurately, of the absence of same—on choice-of-law.

"what do we cover in only three hours" syndrome from the course in conflicts. By emphasizing the differing approaches to choice-of-law and including illustrative and principal and note cases within the framework of those approaches, it makes it possible to cover choice-of-law fully and effectively in less time than many of us have been doing. And by relating those approaches and choice-of-law theory in general to the other components of the subject, it not only frees more time for coverage of those areas, but demonstrates how they are all part of the integrated whole of "our Federalism." The result, I would submit, should be a very meaningful course in the conflict of laws and a thorough understanding of the nature of our federal system for the student.

As stated previously, this was equally evident when the first edition appeared. Why did I—and I believe many others—miss it at that time? Apart from personal predilections as to "teaching our own course," I think that the reason that we missed it then was that as of 1968, the choice-of-law "struggle" was proceeding apace, and chapter 2 of the casebook was not perceived by most of us—oriented as perhaps we were to the many "major" cases that were coming down "fast and furious"—as having "enough" to cover the whole of choice-of-law. This was intensified by the absence of a supplement, which forced us to prepare our own supplements, so to speak, using the newer cases and commentary to "flesh out" the chapter. In the process we may have lost sight of the potential for "revolutionary conflicts pedagogy" that the book *now* appears to have so clearly demonstrated.

And this I think is the real pedagogical significance of the excellent revision of the central chapter 2. The careful selection from among the newer cases and the integration of the views of the "younger generation of conflicts scholars,"¹⁸ as well as the inclusion of new topics such as the unprovided for case and no-fault insurance, provide sufficient "security," so that we may confidently rely on the casebook—with such individual variations as we may desire—to fully and effectively develop for the student an understanding of the choice-of-law process. And when we turn our attention to the other areas of the subject, we find that their treatment in the casebook is complementary to the treatment of choice-of-law, with the result that the casebook serves as a vehicle to enable us to cover the course in breadth as well as in depth. With the advent of the second edition, perhaps the "revolution in conflicts pedagogy" that I believe was the objective of the authors at the time of the first "go-around" will now be realized.

In reviewing this book, I think that I may also have gained some greater insight into the justification for a comprehensive course in conflicts, about which, in recent years, some of us may have had some doubts. After all, we could teach the students "all a practicing lawyer needs to know about conflicts" in perhaps 10 or 15 class hours. How then, in the search for a "relevant" curriculum, can we justify devoting three or four times that number of hours to this "traditional" course? Since conflicts is not a first year course, we cannot fall back on the familiar litany of first-year instructors whose courses are invariably necessary to "teach the students to think" and to "prepare them for all the other courses they will take." We could say that the course is "intellectually fascinating"—which would immediately turn many students off—¹⁹ or that it is a good way to "review the other courses"—which will appeal to the "bar exam buffs," particularly since conflicts itself is a bar exam course in about two-thirds of the states. But this kind of justification is not really very satisfactory. Nor am I content to justify a "full dress" course in conflicts on the ground that it teaches the students how to deal with—or at least how to recognize—the inter-

¹⁸ See the discussion at pp. 6-7.

¹⁹ See p. 597.

state problems which they will occasionally have in practice. As stated above, we could do this in far less time.

No, I think that the justification for a comprehensive course in conflicts is much more fundamental, and it is this justification which, in my view, comes out most clearly in the Cramton, Currie and Kay casebook. In the course in conflicts, whatever else we may be doing, we are teaching the student about *federalism*, about "our Federalism," as it is reflected in the matter of choice-of-law between the differing laws of the states that make up our federal union, in the matter of the recognition of a judgment rendered by the court of one state on the part of the courts of the other states, in the matter of the power and propriety of the courts of the states taking jurisdiction over persons and controversies connected with more than one state.²⁰ As regards the relations between the states themselves then—what may be called the interstate component of "our Federalism"—it is the course in conflicts in which this subject is explored by future lawyers. That this is the primary function of the course in conflicts is most cogently demonstrated by the authors' approach to the problems of choice-of-law, jurisdiction of courts and recognition of judgments as "issues of the distribution of powers in the American federal system." Viewing the course from that perspective, the "contemporary"—and I would submit "inherent"—relevance of the course in conflicts as an essential part of the education of future lawyers cannot be doubted.

My conclusion, then, after reviewing this truly masterful work, is that it not only serves as a vehicle for "revolutionary conflicts pedagogy," but that it also firmly establishes the justification for a comprehensive course in conflicts in the law school curriculum of today and tomorrow. For what more could one ask?

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HANS A. LINDE AND GEORGE BUNN, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES*. Mineola, New York: The Foundation Press, Inc., 1976.
Pp. lxxiii, 987.

These materials are heady stuff. They should be fun to teach, and fun to learn from. They open to law students dimensions of legal order which the law curriculum typically leaves unexplored. More important, they convey the excitement and challenge of statecraft. Here is a potent inoculation against the ennui which debilitates so many law students past their second semester. The Linde-Bunn collection does not merely offer a lively experience within the frame of the problems into which the authors guide their readers. Beyond that, that materials encourage a point of view and expose a range of interests which should arm students to find greater rewards in more staple courses.

¹⁹ As it may have a distinguished substantive law authority who referred to our "sacred subject" as a "dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon." Prosser, *Interstate Publication*, 51 *Mich. L. Rev.* 959, 971 (1953).

²⁰ This does not mean that we are also not teaching the student about international conflicts, but such teaching occurs primarily in the context of relating the resolution of such conflicts to the resolution of interstate ones—and comparing any differences that may be found to exist.